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# Coastal State Fishery Regulation Under International Law: A Comment on the *La Bretagne* Award of July 17, 1986 (The Arbitration Between Canada and France)

WILLIAM T. BURKE\*

## INTRODUCTION

During the early negotiations leading to the 1982 Convention on the Law of the Sea,<sup>1</sup> in the period 1974-76 when most of the basic negotiations were completed on the non-seabed portions of the ultimate treaty, it was widely believed that fisheries issues engaged the most intense political interest on the part of States, both developed and developing.<sup>2</sup> Non-resource issues, the foremost being navigation rights, were no doubt of greater significance to some states but were not as widely appreciated as those concerning resources.<sup>3</sup> In contrast

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1. United Nations Convention on the Law of the Sea, *done* Dec. 10, 1982, U.N. Doc. A/CONF.62/122 *reprinted in* 21 I.L.M. 1261 (1982) [hereinafter cited as LOS Convention]; XVII Official Records, Third United Nations Conference on the Law of the Sea 151, U.N. Doc. A/CONF. 62/122, 7 Oct. 1982.

2. The first draft text of the treaty was issued in the spring of 1975 as the Informal Single Negotiating Text and its general provisions on fisheries were virtually final. Other than for drafting purposes, very few changes occurred over the next seven years, and these primarily reflected the negotiations over landlocked and geographically disadvantaged states.

3. This is probably explained by the circumstance that military considerations were widely perceived as most important for navigation rights, although more general factors were not wholly neglected. From a global perspective certainly, navigation rights essential to the movement of cargo are far more critical to states in general than are fisheries. The primary tradeoffs in the negotiations involved resource and navigation interests. If the former were satisfied, this would assure a satisfactory regime for

to deep seabed mining, which generated most of the public attention, fisheries negotiations were taken seriously because they concerned immediately available resources and would affect extremely large *current* investments. On a global basis, beginning in the latter half of the 1950's, enormous commitments of capital and labor had been made to fisheries harvesting and processing which were occurring within areas that would probably come under coastal state jurisdiction.<sup>4</sup> The outcome of the negotiations would have major impact on these investments and on the patterns of social, economic, and political life they represented.

For these reasons, considerable pressure understandably attended these negotiations. The proposals being considered most seriously were virtually 180-degree reversals of a regime that had prevailed for hundreds of years and had provided the foundation for national fishing strategies for greatly increased fishing effort of the past several decades. Alternatives under discussion threatened significant losses — in employment, sources of foreign exchange, protein supplies and even national territory — which in turn could result in

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navigation.

4. Data on development of national fishing fleets is scarce and the best way to document investment in fishing is by the evidence of increased catches. Over the period 1950-70, total world landings of fish (excluding whales and seaweed) increased from 21.2 to 66.3 million metric tons, indicating a tripling of effort.

In an exhaustive study of fisheries and management, John Gulland notes

[T]he feature of the world's fisheries in the 1960s and 1970s which distinguishes them from earlier periods — and almost certainly from future periods — has been the importance of long-range fishing. The invention of freezing at sea, and particularly of the large factory trawler pioneered by the British *Fairtry*, has enabled countries with few resources around their coasts to become major fishing countries, as well as allowing those with good, but still limited, local resources to expand their catches beyond those limits. The most noticeable examples have been the countries of eastern Europe; Russian catches increased nearly six-fold between 1950 and 1975, reaching over 10 million tons in 1976, and the expansion of Polish catches (to over 800,000 tons in 1975) has been almost as striking. Another important long-range fishing country has been Japan — particularly for tuna — but others, including some developing countries (e.g. Republic of Korea, Ghana, and Cuba), have their own long-range fleets.

GULLAND, *WORLD RESOURCES OF FISHERIES AND THEIR MANAGEMENT*, V MARINE ECOLOGY, Part 2, 839, 844 (Otto Kinne, ed. 1983).

Kravanja estimates Soviet investment in fishing and support fleets during the 1946-75 period to be about US \$11.2 billion. Kravanja, *The Soviet Fishing Industry: A Review, in Soviet Oceans Development, a National Ocean Policy Study*, 94th Cong., 2d Sess. 377, 424-25 (1976). The overall magnitude of investment by other nations might have equalled and perhaps exceeded that of the Soviets. For general discussion of the increase in fishing effort for two decades after World War II see FAO, *The Management of Fishery Resources* 3-6 (1967).

For a more general assessment of the importance of fisheries to individual nations as a source of food, balance of payments, employment, and other economic effects see FAO Dept. of Fisheries, *The Economic and Social Effects of the Fishing Industry — a Comparative Study*, FAO FISH. CIRC. NO. 314 (1973) (Document prepared by FAO for the United Nations Seabed Committee.)

damaging social, economic and political costs, especially for nations with weak agricultural systems or for those who elevated concepts of maritime sovereignty into emotion-laden issues of national pride and respect.<sup>5</sup> Distant water fishing states (both developed and developing, but mainly the former) would be the principal losers, while numerous coastal (especially island) states might reap potentially large benefits.<sup>6</sup>

Reaching compromises to resolve the fishery jurisdiction issues was, therefore, likely to encounter difficulties. In order to overcome serious differences of view, here, as on other controversial matters, successful negotiations were virtually certain to require formulas that were general and somewhat abstract but still technically capable of providing useful guidance for decisions. There is certainly no lack of concepts in articles 61-73 of the 1982 Convention<sup>7</sup> that fit this description, including allowable catch, maximum sustainable yield as qualified by relevant environmental and economic factors, optimum utilization, and harvesting capacity.<sup>8</sup>

It is now almost six years since the adoption of the LOS Convention and over ten years since the general acceptance of unilaterally extended fisheries jurisdiction, but we are still only in the early phases of working out the implications of these events for wealth and other value distributions. Establishing national fisheries regimes is a difficult and time-consuming task, even for the leading developed nations. The conflicts and controversies over the benefits and the burdens of exclusive economic zone (EEZ) provisions on fisheries are still underway; in the course of the maneuvering, participants still disagree about the appropriate interpretation of key terms in the

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5. Different participants faced differing losses. Probable losers of varying seriousness included the USSR, Japan, South Korea, Poland, Spain, Ecuador, and Peru. While the United States as a whole was not likely to lose, individual industries were vulnerable, especially shrimp and tuna. As it turned out, both have lost free access to their normal fishing areas off foreign coasts.

6. These prospects were later realized in varying degree when states generally moved to 200 mile zones while the law of the sea negotiations were still in the earlier stages. See Cleveland, *National Adjustments to Changes in Fisheries Law and Economic Conditions*, FAO FISH. CIRC. NO. 783, 25 (1985). See also Troadec, *Introduction to Fisheries Management* 1-2 FAO FISH. TECH. PAPER NO. 224, 12 (1983) and literature cited therein.

7. These are the major provisions on fisheries in the exclusive economic zone. Other articles concern archipelagic waters and high seas. LOS Convention, *supra* note 1.

8. Allowable catch, LOS Convention article 61(1); maximum sustainable yield as qualified, article 61(3); optimum utilization, article 62(1); capacity to harvest, article 61(2).

treaty in relation to fisheries.<sup>9</sup> Although the treaty is not in force,<sup>10</sup> states and other advocates invoke its provisions, along with state practice, to argue that customary international law supports or rejects particular claims, often the same claim as in the controversy discussed here.<sup>11</sup>

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9. It seems probable that a good deal more evidence exists for this proposition than is generally known in light of the considerable difficulties now experienced in discovering the views of states on these and other law of the sea issues. The following instances can be documented:

(1) Japan and Korea are reported to have urged that the reference to "economic dislocation" in article 62(3) required that United States bilateral fisheries agreements referring to conditions of access to its exclusive fisheries zone be changed. Remarks of Hon. Don Young, April 21, 1982, CONG. REC. E1668, (1982);

(2) In a diplomatic message to Spain, the United States stated its disagreement with the Spanish interpretation of articles 61, 62, 69 and 70 (unpublished cable July, 1985);

(3) In domestic legislation within the United States seeking to enjoin enforcement of United States law imposing heavy fines for taking fish in violation of foreign law, plaintiffs unsuccessfully argued that Mexico's prohibition of foreign shrimp fishing in the Mexican EEZ was a violation of the requirement of optimum utilization in article 62. *Brownsville-Port Isabel Shrimp Producers Association v. Anthony J. Calio et. al.*, Doc. No. B-85-99 (S.D. Tex., June 19, 1985);

(4) Referring to LOS Convention, articles 61-62 and the attitude of certain undis-closed states, probably European and West African, fishery experts recently wrote:

Though on the surface reasonably straightforward, these run into problems when matched against the complexities of the dynamics of fish populations, or of the national interests and relationships involved in giving access. It is becoming clear that there are therefore considerable uncertainties, especially in developing countries, about what is really involved, and these in turn have caused uncertainties in national policies, not only in the granting of access, but in matters that might be related to access. For example it appears that some coastal states are reluctant to enter into joint programs of fishery research and assessment of fish stocks with long-distance fishing countries on the grounds that such research would give to foreigners excessive knowledge of resources available and would commit coastal countries to given access to those resources at some later time.

Garcia, Gulland, and Miles, *The New Law of the Sea, and the Access to Surplus Fish Resources*, 10 MARINE POLICY 192-93 (1986).

(5) The United States and numerous coastal and island states in the eastern, central and western Pacific are in profound disagreement over the interpretation of articles 56 and 64 concerning coastal state authority over tuna as one of the living resources of the EEZ. The recent fishing agreement between the United States and the Pacific Island States of April, 1987, is interpreted by some as indicating that the United States no longer contests coastal state authority. But others do not believe the United States has changed its position.

10. As of Aug. 1987, 159 nations have signed the Convention. Thirty-five nations have deposited instruments of ratification with the U.N. The Convention enters into force one year after 60 ratifications are deposited. *Ocean Pol'y News.*, pt. 1, Aug. 1987.

11. Of course, much more than fisheries is involved. The United States alone has made numerous protests to other nations, citing the 1982 Convention as reflecting customary international law on a variety of contemporary issues. Issues involved include transit passage of aircraft and vessels, archipelagic waters, archipelagic sea lanes passage, closing lines for bays, criteria for straight baselines, authorization or notification of passage through the territorial sea, priority for allocations of surplus fishery resources in the EEZ, the scope of coastal state discretion to determine the allowable catch, harvesting capacity and surplus allocation, the extent of coastal state criminal jurisdiction in the EEZ, and the provisions of article 76 on the continental shelf. Some of these are discussed in Burke, *Law of the Sea: Customary Norms and Conventional Rules*, in 1987

State practice is helpful in providing details about management options and specific regulatory alternatives. Trends in practice help establish the bounds of permissible regulatory competence. States also look for guidance to third party decisions dealing with the fisheries provisions of the 1982 LOS Convention. In the context of myriad contentions about who gets what from fisheries under varying conditions, the judgment of a third party on the relevance and meaning of treaty standards may be valuable beyond the immediate context of the decision. It may sort what is acceptable from what is not and assist in bringing order to complicated transactions.

The point of this commentary is that these third party perspectives have merit in particular instances, but those concerned cannot automatically assume that such decisions invariably provide helpful guidance. While reasoned decisions may sometimes deserve special weight in the process of establishing agreed guidelines for the permissible exercise of fishery authority under either the 1982 Convention or customary law, careful assessment is required to determine their value for this purpose.

Because of these considerations, nations as well as observers of the international legal process have reason to be particularly interested in the July 1986 decision of the arbitral tribunal established by Canada and France to resolve a dispute arising out of their 1972 agreement on mutual fishing relations. The Award in this arbitration is the subject of this commentary.<sup>12</sup>

In a recent article, Prof. Michael Reisman proposed the study of international incidents as a decision unit in international law that could provide valuable guidelines for assessing the expectations of decision-makers on significant issues.<sup>13</sup> Commenting upon this proposal, Prof. Bowett observed that the Canada-France Arbitral Award does not fit under the incident genre and must be studied by "nor-

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Proceedings of the American Society of International Law (in press) and Burke, *Customary Law as reflected in the Convention: A Slippery Formula*, paper presented at the 21st annual meeting of the Law of the Sea Institute, August, 1987 (in press).

12. The Award is available in French in 90 REV. GEN. INT'L PUB. 716 (1986). As yet, apparently, there is no published English language version of the decision. The author obtained a version from the Canadian Office of External Affairs, in addition to the Canadian Memorial, Countermemorial, annexes thereto, and the text of Canada's oral pleadings. The French pleadings remain confidential, as permitted by the Arbitral Agreement. The Award of July 17, 1986 contains the text of the 1972 Agreement, the 1985 Arbitration Agreement and the Award itself.

13. See Reisman, *International Incidents: Introduction to a New Genre in International Law*, 10 YALE J. INT'L L. 1 (1984); see also Willard, *Incidents: An Essay in Method*, 10 YALE J. INT'L L. 21 (1984); Falk, *The Validity of the Incidents Genre*, 12 YALE J. INT'L L. 376 (1987).

mal, traditional analysis.”<sup>14</sup> Perhaps this is true, but it does not detract from Prof. Reisman’s assertion that the decisions of such tribunals are given undue deference as authoritative expressions of international law.

An objective of the instant commentary is to assist in avoiding the possibility of “undue deference” to the Award in question. The decision by the Tribunal in the *La Bretagne* case has little substance that makes it worthy of consideration or adoption. The majority opinion does not merit emulation either for the process of legal analysis, for its approach to treaty interpretation, for its use of prior decisions, or for its views about substantive international law for fisheries.

### *Background of dispute*

During the period 1964-70, Canada took several actions to enlarge the reach of its exclusive fisheries jurisdiction. One such action was including the Gulf of St. Lawrence within Canadian fisheries closing lines in 1970. Subsequently, Canada sought to reach agreement with other states whose fishing activities were affected. After the first modest extensions of fisheries limits in 1964, negotiations with France were inconclusive. Following the establishment of fishing closing lines in the Gulf in 1970, Canada renewed negotiations. These negotiations sought to phase out metropolitan France fisheries in Canadian waters while allowing local fisheries to continue from Saint-Pierre and Miquelon, small French islands off the coast of southern Newfoundland. These negotiations led to the 1972 Agreement on these and other matters.<sup>15</sup>

Article 3 of the 1972 Agreement provides for phasing out the fishery conducted from metropolitan France:

Fishing vessels registered in metropolitan France may continue to fish from January 15 to May 15 each year, up to May, 1986, on an equal footing with Canadian vessels, in the Canadian fishing zone within the Gulf of St. Lawrence.<sup>16</sup>

The fishery from the islands of Saint-Pierre and Miquelon enjoyed different treatment because of their close proximity to the Canadian coast and to the Gulf, the modest size of the fishery, and local economic dependency on the fishery. Article 4 embodies the relevant provisions:

In view of the special situation of Saint-Pierre and Miquelon and as an arrangement between neighbors:

(a) French coastal fishing boats registered in Saint-Pierre and Miquelon may continue to fish in the areas where they have traditionally fished along the coasts of Newfoundland, . . .

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14. Bowett, *International Incidents: New Genre or New Delusion?*, 12 YALE J. INT’L L. 386, 387 (1987).

15. The text of the Agreement is included in the AWARD, *supra* note 12 at 5-7.

16. AWARD, *supra* note 12 at 6.

(b) A maximum of ten French trawlers registered in Saint-Pierre and Miquelon, of a maximum length of 50 meters, may continue to fish along the coasts of Newfoundland, of Nova Scotia (with the exception of the Bay of Fundy), and in the Canadian fishing zone within the Gulf of St. Lawrence, on an equal footing with Canadian trawlers: Canadian trawlers registered in the ports on the Atlantic coast of Canada may continue to fish along the coasts of Saint-Pierre and Miquelon on an equal footing with French trawlers.<sup>17</sup>

Article 6 of the Agreement spells out the obligations of Canada in the exercise of its authority to regulate all the French fisheries:

1. Canadian fishery regulations shall be applied without discrimination in fact or in law to the French fishing vessels covered by Articles 3 and 4, including regulations concerning the dimensions of vessels authorized to fish less than 12 miles from the Atlantic coast of Canada.
2. French fishery regulations shall be applied under the same conditions to the Canadian fishing vessels covered by Article 4.
3. Before promulgating new regulations applicable to these vessels, the authorities of each of the parties shall give three months prior notice to the authorities of the other party.<sup>18</sup>

The specific facts and claims giving rise to the dispute are as follows. In January, 1985 a company in Saint-Pierre and Miquelon sought a license from Canada for the vessel *La Bretagne*, registered in Saint-Pierre and Miquelon, to fish in the Gulf of St. Lawrence. *La Bretagne*, a so-called freezer-trawler, was equipped to fillet the catch and store it aboard the vessel. Such vessels have much greater fishing capacity than the wetfish trawlers which had previously fished in the Gulf. Freezer-trawlers would normally take more fish because they are able to fish longer and to store more aboard. In refusing the requested license to operate as a freezer-trawler, Canada still allowed the vessel to fish but limited processing of the fish to heading and gutting rather than filleting. The Canadian refusal was based on its authority to regulate and on the article 4(b) principle of equal footing, since Canada's trawlers in the Gulf were also prohibited from filleting their catch. France responded that this prohibition violated obligations in the 1972 agreement.<sup>19</sup>

Under the 1972 Agreement the parties had agreed in article 10 to resolve their dispute through a compulsory dispute settlement procedure. Pursuant to that procedure, the parties constituted a Tribunal. Each party designated an expert and their two governments selected a third to serve as chairman.<sup>20</sup> The precise question before the Tri-

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17. *Id.*

18. *Id.*

19. This account is from the Tribunal's statement of the origin of the dispute. *Id.* at paras. 14-16.

20. *Id.* at 7.



bunal was whether the French trawlers referred to in article 4(b) may or may not be forbidden to engage in fish filleting in the Gulf of St. Lawrence.

In a two-to-one decision the majority of the Tribunal decided that Canada may not forbid filleting in the Gulf of St. Lawrence by these vessels. The majority consisted of the French member, Jean-Pierre Quneudec, and the third expert, Paul de Visscher. The Canadian member, Prof. Donat Pharand, dissented in a separate opinion.<sup>21</sup> First, the majority decided that Canada's authority to regulate French fishing derived solely from article 6 of the 1972 Agreement.<sup>22</sup> Second, the Tribunal interpreted "fishery regulations" in article 6 to mean only fish-catching regulations. Therefore, Canada could not prescribe regulations that dealt with other operations by French vessels, such as the filleting phase of processing.<sup>23</sup>

These decisions by the majority of the Tribunal appear to be straightforward, even mundane. However the opinion and underlying rationale are flawed, deliver general pronouncements which raise serious questions, and reach conclusions unsupported by international law. The majority did not explain why, if the Agreement did not deal with the totality of Canada's fishery regulations, Canada would be unable to adopt and implement or apply other laws for those areas not covered. The only apparent ground for refusing to recognize such competence is that the 1972 Agreement was intended to comprise all of the authority Canada could exercise as an independent state. In the course of its opinion, the majority discusses international fisheries law both as customary law and as conventional law involving both bilateral and multilateral agreements.<sup>24</sup> Unfortunately this discussion reveals a considerable lack of understanding of fishery conservation, fishery management, and the international law pertaining to such matters.<sup>25</sup> Perhaps this is because the technical language and terminology in these fields are alien to most lawyers and therefore communication and understanding of relevant legal concepts are also unusually difficult.

Whatever the reasons for their decision, if the narrow and rigid perceptions of fishery management and law in this opinion were typi-

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21. *Id.* at 45.

22. See text at note 32 and following.

23. See text at note 71 and following.

24. AWARD, *supra* note 12 at paras. 49-54.

25. Some examples of this lack of understanding are omission of the most critical qualifying words in article 61 of CLOS regarding the conservation measures of coastal states, perhaps because their significance was not recognized (*infra* note 90 and accompanying text); an extremely restrictive view, not generally followed, of the scope and purposes of fishery management (*infra* note 64 and accompanying text); a belief that international fishery agreements are predominantly concerned with protection of fishery stocks, as opposed to concerns for the economic welfare of fishermen and the fishing industry (*infra* notes 86-115 and accompanying text).

cal of decision-makers generally, there is cause for apprehension about the success of instituting modern fishery conservation and management measures around the globe when foreign fishing activities are affected. If these perceptions are more widely adopted, important interests of coastal states could be seriously harmed or destroyed entirely. These perceptions may lead to confusion or misunderstanding about the economic, social and political goals and methods of fishery management and about a coastal state's authority to adopt appropriate regulations.<sup>26</sup>

In this specific case, the dissenting opinion by Prof. Pharand is important for more than its cogent analysis of the positions of the two parties in contemporary international law. It also offers an instant antidote to the numerous errors of the majority by communicating a clear understanding of and orientation to the broad aims and measures of modern fishery management. In addition, it clarifies the applicable law.

The following discussion highlights Prof. Pharand's opinion by noting the more general implications of statements about fundamental principles that are significant beyond this immediate controversy. This dispute arose between a coastal fishing state and a distant water fishing state. It is impossible to overlook the fact that the members of the majority in this case are nationals of France and Belgium, both member states of the European Economic Community (EEC), now the fourth largest fishing "State" in the world.<sup>27</sup> Under its char-

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26. This is part of a larger problem that has not escaped notice: Historically fishery management has been concerned [sic] as a biological problem, dealing with the conservation of fish stocks and improving the physical yields harvested from them. It has often been felt that it is sufficient to ensure that the stocks are maintained in condition in which high catches can be taken, without much concern of what benefits are gained from the catches. This attitude is now changing, and it's now recognized that fisheries is [sic] an economic activity involving a broad spectrum of individuals and interests. Catching or not catching fish affects not only fishermen, but processors and consumers as well. The success of management, in terms of the full and rational utilization of the resource depends on many decisions, taken by investors, tax authorities and others in addition to those setting management controls (e.g., catch quotas).

The problem of identifying the correct boundaries of the management problem, and of ensuring that no important interest and influence is omitted, is discussed further in section 4.2. What should be stressed here is that although the wider view of management is becoming accepted, the narrow, biological view is still common. This makes taking the larger view difficult and a matter that will often require special attention.

FAO, Report of the ACMRR Working Party on the Scientific Basis of Determining Management Measures, FAO FISH. REP. NO. 236 (1980).

27. In 1985 the combined catch of EEC members, including Portugal and Spain,

ter, the EEC supplants the authority of its member states for purposes of fishery management. The EEC, rather than the member states, conducts any necessary international negotiations concerning fisheries in non-EEC waters (with only minor exceptions).<sup>28</sup> Member states routinely take nearly all the fish available in EEC waters (the combined fisheries zones of its members). Thus, they are concerned about gaining access to the fisheries zones of non-EEC members, most of whom are distant from the EEC states.<sup>29</sup>

Against this background, coastal states and other distant water states have a close interest in the Tribunal's treatment of a number of critical issues. The following discussion focuses on the Tribunal's statements and views on the following matters: (1) the source of coastal state authority over fisheries outside national territory but within extended jurisdiction; (2) the scope of coastal state regulatory authority in exercise of its sovereign rights; (3) the scope and general content of coastal regulatory authority under the 1982 LOS treaty; (4) the supposed difference between authority to regulate fishing by nationals as opposed to foreign fishing within national jurisdiction; (5) the application of the standard of reasonableness in exercise of coastal state regulations; and (6) the implications of a compulsory dispute settlement provisions in a bilateral fishery agreement.<sup>30</sup>

It is not clear what harmful effects the actual decision will have on Canada's regulatory authority. Perhaps the only impact will be limited, affecting no more than regulatory and enforcement costs and administrative burdens. However, it is conceivable that much broader consequences could ensue, such as insulating French factory trawlers from Canadian quota control or influencing Canada to in-

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was exceeded only by the USSR, Japan and China. 1984 FAO Yearbook of Fishery Statistics, vol. 60, Table A-5 (1987).

28. For an illuminating discussion of EEC treaty-making power regarding fisheries, see R. CHURCHILL, EEC FISHERIES LAW, chap. 5 (1987). See also generally LEIGH, EUROPEAN INTEGRATION AND THE COMMON FISHERIES POLICY 123-24 (1983); Simmonent, *Competence of the European Economic Community in the Field of Fisheries*, in Report of the Expert Consultation on the Conditions of Access to the Fish Resources of the Exclusive Economic Zones, FISH REP. No. 293, 183 (1983); Koers, *What Trends and Implications: The Northwest Atlantic*, in the MANAGEMENT OF WORLD FISHERIES: IMPLICATIONS OF EXTENDED COASTAL STATE JURISDICTION (Edward L. Miles, ed., in press).

29. For an assessment of the EEC catch possibilities, which also include joint stocks and stocks outside exclusive fisheries limits, see Holden, *The Procedures Followed and the Problems Met by the European Economic Community*, in Implementing the Scientific Recommendations of the International Council for the Exploration of the Sea on Total Allowable Catches, in Papers presented at the Expert Consultation on the Regulation of Fishing Effort (Fishing Mortality), FAO FISH. REP. No. 289, Supp. 3, 231 (1985).

30. It is not the intent here to attempt a systematic review of the Tribunal's use of the principles of treaty interpretation although the majority opinion is a veritable mine of examples of how not to proceed with that task, some of which are mentioned in the text.

crease French quotas substantially, to the disadvantage of local fishermen. Even if the negative impact is modest, an unjustified decision still imposes the limited harm of inconvenience and increased costs for the losing side. The actual impact of the decision will be determined by the subsequent actions of the parties as the relations between them evolve in light of this decision. Canada's relative position in that evolution already may be disadvantaged by this decision.<sup>31</sup>

As this decision and the statements in the opinions become more widely known, there is potential for broader undesirable impacts through unnecessary controversies and misleading and erroneous guidance to decision-makers in unavoidable disputes. The objective of this comment is to assist in avoiding that possibility. The particular decision discussed here has little to recommend it. The award does not merit emulation either for the process of legal analysis, for its approach to treaty interpretation or for its views about substantive law. Nonetheless, its potential for use as supporting authority, for reasons mentioned herein, makes critical appraisal of this award even more desirable.

### *The Source of Coastal State Authority Over Fisheries*

The key issue in dispute, the prohibition of filleting, centers about articles 4(b) and 6 in the 1972 Agreement for which the parties requested two "radically different interpretations."<sup>32</sup> Canada urged an interpretation of the Agreement that recognized the "right for trawlers registered in Saint-Pierre and Miquelon to fish in the Canadian fishing zone within the Gulf of St. Lawrence, on an equal footing with Canadian vessels in compliance, without discrimination in fact or in law, with Canadian fishery regulations which prohibit filleting in the Gulf."<sup>33</sup> Canada also contended that under the general principles of the law of the sea it has "an inherent right to manage the biological resources of its exclusive fishing zone, subject to the sole exceptions mentioned in the text of the Agreement of March 27, 1972."<sup>34</sup> In the Canadian view, article 6 authorized Canada to apply the entire corpus of its law relating to fishery matters, including

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31. See *infra* notes 137-38 and accompanying text regarding the possibility that the decision can be and may be used by France to continue to challenge Canada's exclusive rights in the Gulf of St. Lawrence. This appears to be the thrust of the French protest message of January 1987 rejecting Canada's exclusive right to establish a quota and challenging the size of the quotas established.

32. AWARD, *supra* note 12, at para. 24.

33. *Id.*

34. *Id.*

processing, subject only to the principle of nondiscrimination.<sup>35</sup>

Clearly, under Canada's view, the French right to fish came from the 1972 Agreement, but Canada's power to regulate did not. That power is plenary and comprehensive regarding fishery matters. According to Canada, the Agreement was primarily relevant for determining what limitations it imposed on Canada's otherwise plenary and comprehensive power to manage its fisheries.<sup>36</sup>

France, in direct opposition, believed that both the right to fish and the total scope of Canada's power to regulate are found in the agreement between them. France argued that article 4(b)'s "sole object is the right to fish"<sup>37</sup> and since filleting the fish is not "to fish," Canada

may not use the regulatory power which derives from Article 6 of the Agreement of March 27, 1972 for purposes other than the protection of the fishery resources of its exclusive fishing zone, a finality which the Parties to the Agreement have fully taken into consideration by imposing specific limits as to the number and dimensions of French trawlers registered in Saint-Pierre and Miquelon.<sup>38</sup>

This position necessarily assumes that Canada has no regulatory authority over its fisheries except as provided by the Agreement.

In a ruling that pays only modest deference to the injunction in article 10 of the Arbitration Agreement of Oct. 23, 1985 that the "award shall be fully reasoned," the Tribunal concludes, virtually without explanation, that Canada's authority to regulate its fisheries stems solely from article 6 of the bilateral agreement<sup>39</sup> and, as discussed further below, that regulatory authority is confined to regulation of harvesting. This finding derives primarily, if not solely, from the Tribunal's idiosyncratic view of the type of agreement reached by the Parties. The Tribunal placed enormous weight on the simple fact that this was a bilateral agreement rather than multilateral.<sup>40</sup> From this the Tribunal concluded that "each Party seeks its own interests and the common purpose of the two parties is summed up in the reconciliation of these interests in the form of a compromise."<sup>41</sup>

The resulting agreement is "an arrangement based on a delicate, fragile balance between the rights and duties of each of the Parties."<sup>42</sup> It follows from this that "[i]n a treaty of this type, there appears to be no warrant for treating the rights of one of the parties

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35. *Id.* at para. 35.

36. *Id.* at para. 24.

37. *Id.* at para. 24.

38. *Id.* (emphasis added).

39. This crucial holding follows the French argument in the case. *Id.* at paras. 36-37.

40. *Id.* at para. 30.

41. *Id.*

42. *Id.*

as a statement of principle and the rights of the other as a statement of an exception which, as such, would justify a restrictive interpretation."<sup>43</sup> This phrase appears intended to dispose of the basic principle of international law that a coastal state, such as Canada in this instance, possesses the right to manage its living resources within an exclusive fishing zone established in accordance with international law.<sup>44</sup>

This refusal of the Tribunal's majority to treat Canada's sovereign rights as a basic principle sharply contrasts both with current understanding about coastal state rights in exclusive economic (or fishing) zones and with the expectations of Canada *and* France as revealed in the minutes of the negotiations in 1964 and 1971.<sup>45</sup> There can be no serious doubt that in an exclusive fishing zone the basic principle is that the coastal state has sovereign rights to explore, exploit, conserve, and manage its fisheries. The Tribunal, elsewhere in its opinion, expressly recognized these rights as well as the sole responsibility of Canada for fishery management.<sup>46</sup> Nonetheless the Tribunal declares without explanation that in a treaty of this type it was not required to be guided in resolving the issue in dispute, by reference to the basic principle involved.

The central passage of the Tribunal's opinion on the specific source for Canada's regulatory authority in this instance then follows immediately:

In accordance with the principles embodied in Article 31 of the Vienna Convention on the law of treaties, (dealing with the general rule of interpretation), the Tribunal proposes to reply to the question put to it in the light of the balance jointly sought by the Parties between the right to fish granted to the French trawlers covered by Article 4(b) of the Agreement and the right to regulate fisheries in the Gulf of St. Lawrence *possessed by Canada by virtue of Article 6 of the same agreement*.<sup>47</sup>

43. *Id.* But the Tribunal does not hesitate to adopt a restrictive interpretation of Canada's rights under the treaty. The right to fish asserted by France is given an expansive interpretation, indeed it is considered to provide a preference as against Canadian vessels, while Canada's sovereign right to regulate is given a very narrow and limited scope. This is discussed in the next section.

44. In fact the waters involved in the Gulf of St. Lawrence were regarded by the parties in the negotiations leading to the 1972 agreement as internal waters, not just as an exclusive fishing zone. In either case there is no doubt that the coastal state possesses sovereign rights to regulate fisheries and to decide upon the conditions of their exploitation. The majority decision in this case treated the Canadian waters in question as part of a fishing zone and not as internal waters.

45. Annexes 41-43 of the memorial submitted by Canada, Feb. 22, 1985.

46. AWARD, *supra* note 12, at paras. 49, 63.

47. AWARD, *supra* note 12, at para. 31. (Emphasis added). This phraseology does not appear to be simply a loose means of recognizing that Canada has regulatory authority within its fishing zone. In paragraph 24, noted earlier, the Tribunal summarized the

The sentences just quoted appear to be the only justification or explanation offered for the Tribunal's conclusion. The Tribunal does not attempt to support its conclusion by reference to specific terms in the 1972 Agreement, possibly because there are indeed no such terms to carry such a load. The only relevant term is the simple reference in article 6 to "Canadian fishery regulations" which, on its face and in context, would seem to indicate a referral to all of the law of Canada pertinent to the "fishery matters" the Agreement was designed to address.<sup>48</sup> This is an especially compelling interpretation in light of the protection given French rights by the prescription that these regulations cannot discriminate against the Saint-Pierre and Miquelon vessels.<sup>49</sup>

It is implausible to maintain that the mere mention of Canada's laws was intended to displace and restrict the authority of Canada under international law to apply its normal fisheries laws, subject to nondiscrimination. Yet, the Tribunal concludes that the term "fishery regulations" exhausts Canada's regulatory authority but still refers only to those aspects of regulations that directly set the conditions for taking fish from the ocean. This renders inapplicable other laws and regulations that relate to fishing but not directly to harvesting.

Given that the 1972 Agreement concerns only some of Canada's laws regulating fisheries, the question immediately arises why Canada is unable to apply other Canadian laws which are not dealt with in the Agreement. The majority opinion does not address this question. The Tribunal's unstated assumption appears to be that if Canada wishes to retain its full sovereign rights over fisheries, it must specifically reserve them in the treaty with France;<sup>50</sup> not having spelled out its sovereign rights, they are lost. According to the Tribunal, the Parties must be treated as if they are on an equal footing in the advantages of the Agreement rather than as if the Agreement

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French interpretation of article 6 to the precise same effect, i.e., that Canada's regulatory authority derives from article 6. *Id.* at para. 24.

48. The Preamble to the 1972 Agreement declares:

The Government of Canada and the Government of France, having regard to the fact the Canadian Government has deemed it necessary, notably with a view to ensuring the protection of Canadian fisheries, to adopt certain measures relating to the delimitation of the territorial sea and the fishing zones of Canada, considering it desirable to adapt to present circumstances their mutual relations in fishery matters,

49. Article 6 of 1972 Agreement. AWARD, *supra* note 12, at 6.

50. If the majority decision were simply interpreted to mean only that Canada is inhibited from imposing regulations on fish-catching, then Canada would not be prevented from regulating processing. But the Tribunal decided that, despite its restrictive interpretation of "fishery regulations," Canada could not, consistently with the Agreement, regulate processing. There appears, therefore, to be an assumption that Canada also promised not to impose any regulations other than those concerning fish-catching. AWARD, *supra* note 12, at para. 53.

contemplates recognition of the general principle of Canada's exclusive fishery authority subject to exceptions in the Agreement.<sup>51</sup>

In the end, the decisive factor is that this is a bilateral agreement between one state seeking to continue its access to a fishery subject to the sovereign rights of another. There have been hundreds of these arrangements for access just in recent years.<sup>52</sup> On this commonplace occurrence the majority of the Tribunal hinged its position that Canada's sovereign rights could not be treated as a "statement of principle and the rights of the other as a statement of an exception."<sup>53</sup> Ironically a great number of bilateral fishery agreements provide that coastal state laws and regulations apply. It had never before been suggested that this meant only *some* of those laws, all others being excluded.<sup>54</sup>

Nothing in the circumstances and records of the negotiations leading to the 1972 Agreement, as reported in the opinion, suggests that either party believed the Agreement alone, interpreted restrictively to exclude normal elements of management authority, was to substitute for Canada's entire authority over fishing matters.<sup>55</sup> The negotiating history not only fails to confirm the Tribunal's restrictive interpretation of the 1972 Agreement, it establishes the opposite.<sup>56</sup> On a fair examination, the record fully supports the conclusion that both parties agreed that France was subject to the entire range of Canada's exclusive fishery jurisdiction as well as other Canadian laws within its general jurisdiction.<sup>57</sup> The minutes of the negotiating

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51. The supposed equality discerned by the Tribunal in this arrangement appears somewhat different in light of the fact that the reciprocal rights to fish apply to areas that are disproportionate in size and fish productivity, in favor of France.

52. A recent study listed a selection of 286 of the "most important" bilateral agreements from 1975 through 1982. Carroz and Savini, *The Practice of Coastal State Regarding Foreign Access to Fishery Resources*, in *FAO, Report of the Expert Consultation on the Conditions of Access to the Fish Resources of the Exclusive Economic Zones*, FAO FISH. REP. No. 293, at 43, 59-72 (1983).

53. AWARD, *supra* note 12, at para. 30.

54. Carroz and Savini, *supra* note 52, at 51-55.

55. The Tribunal discusses and relies upon these records, after specifically acknowledging international case and treaty authority for limiting or excluding the use of preparatory documents. See especially, AWARD, *supra* note 12, at paras. 56-58.

56. See *supra* note 45. These minutes were produced by Canada in the proceedings. The Tribunal noted that they were not challenged by France and were relied upon by France during the hearings. AWARD, *supra* note 12, para. 56.

See especially the meeting of April 8, 1964, para. 11, where Canada noted the jurisdictional problems arising from implementation of its closing lines which included general Canadian legislation, fisheries regulations, and coastal fisheries protection. France noted the change to internal waters and asked if Canada had worked out the implications of this change.

57. See especially the meeting of April 8, 1964 para. 11 where Canada noted the



meetings record evidence of this understanding both in 1964 and in 1971. Several times Canada insisted that it possessed sovereignty in the areas concerned and that nothing inconsistent with that position was acceptable.<sup>58</sup> France did not dispute this, but argued on one occasion that nothing prevented Canada from parting with some of that sovereignty by accepting restrictions on it.<sup>59</sup>

Since the Tribunal made reference to and used these minutes of the negotiations,<sup>60</sup> this evidence of the parties intentions should have been persuasive and given effect. But even without this evidence of intentions, there being no *contrary* evidence of expectations that Canada had agreed to limitations on its sovereign rights, the general expectation would be that Canadian laws and regulations were fully applicable.<sup>61</sup>

This general expectation is easily confirmed in the terms of the agreement actually worked out by the parties: Canada agreed to allow France access to the Gulf's fisheries on the same basis as Canadian fishermen, in accordance with Canadian nondiscriminatory regulations applicable to the entire range of fishing operations normally undertaken in the business.<sup>62</sup> In this view, French fishing vessels would be given a right of access superior to that of any other state

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jurisdictional problems arising from implementation of its closing lines. The implementation included general Canadian legislation, fishery regulations, and coastal fishery protection. France noted the change to internal waters and asked if Canada had worked out the implications of this change.

58. Meeting of July 20, 1964, paras. 25, 27, 32.

59. *Id.* at 32. In this same passage the French negotiator is reported to have said that France recognized Canada's need to assert its full sovereignty and therefore France was prepared to accept a particular provision in a Canadian draft concerning enforcement. France also noted that the subjection to Canada's general jurisdiction might lead to new problems regarding health measures, labor legislation, and customs matters. *Id.* at 37. These statements are obviously inconsistent with the notion that the reference to "fishery regulations" exhausted Canada's regulatory competence.

60. The Tribunal specifically wanted to take account of the French assurances recorded in these minutes concerning any increase in French fishing effort after phasing out metropolitan French fishing vessels. AWARD, *supra* note 12, para. 58.

61. The relevant principle is that of restrictive interpretation which has varying formulations. Whatever one's preferred version, it could be invoked to support this conclusion. The only specific indication of the parties' expectations or intentions supports an interpretation allowing all of Canada's law to be applied to French fishing in Canadian waters. But if uncertainty remained, it would counsel an interpretation that would preserve Canada's right to regulate. For discussion see M. MCDUGAL, H. LASSWELL AND J. MILLER, *THE INTERPRETATION OF AGREEMENTS AND WORLD ORDER* 171-86 (1967), and literature cited therein. See also TAMMELO, *TREATY INTERPRETATION AND PRACTICAL REASON* 14 (1967); HARASZTI, *SOME FUNDAMENTAL PROBLEMS OF THE LAW OF TREATIES* 155-56 (1973); J. STARKE, *INTRODUCTION TO INTERNATIONAL LAW* 457 (9th ed. 1984). As noted in note 43, *supra*, the Tribunal in this case used restrictive interpretation in favor of France in adopting a narrow meaning for fisheries regulations. AWARD, *supra* note 12, paras. 35, 37.

62. AWARD, *supra* note 12, 1972 Agreement, arts. 2-6. This was the purpose of arts. 2-6. The quid pro quo for Canada was the French renunciation of its "privileges established to its advantage in fishing matters" by the 1904 Convention between the U.S. and France.

except Canada, but would nevertheless be subject to the full reach of Canada's sovereign right to regulate, provided the regulation was nondiscriminatory. The almost casual reference in article 6 to "Canadian fishery regulations" is much more consistent with the notion that Canada retained its general authority subject to the treaty's exceptions than with the notion that Canada had somehow surrendered its sovereign rights except as preserved in the agreement and thereby conferred preferential rights on French trawlers registered in Saint-Pierre and Miquelon.

As a general approach to the interpretation of bilateral fisheries agreements, the majority's views about the irrelevance of the basic principle of coastal state sovereign rights are startling in their implications. If this approach were generally followed, the coastal state entering into a bilateral agreement to allow foreign fishing would lose its sovereign rights unless it specifically preserves them. This proposition is without authority in international law. Nothing in the Vienna Convention or article 31 thereof requires such a result or is even relevant to such a determination.<sup>63</sup>

Reference to article 31 contributes nothing to the task of identifying a party's legal rights or position *prior* to entering into a negotiation. There can be no serious doubt that Canada's rights to manage fisheries within its resource jurisdiction are sovereign rights and that they exist independent of any bilateral agreement. If the question were how those rights were lost or negotiated away by the terms of the treaty, then presumably article 31's provisions on interpretation could have direct bearing. However the Tribunal did not reach its result by interpreting the agreement. It simply assumed the answer to the source of Canada's authority on the basis of the bilateral nature of the agreement. It never explained why this single factor ought to deprive a State of its inherent power of regulating fishery activities within its jurisdiction.

### *The Scope of Coastal State Regulatory Authority*

The critical importance of the Tribunal's conclusion about the source of Canada's regulatory power is obvious in light of the Tribunal's holding with regard to the scope of that power. The Tribunal's notion that Canada's regulatory power is possessed by virtue of article 6 means that the terms of this article alone determine what regu-

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63. U.N. Doc. A/CONF. 39/27 (23 May 1969), reprinted in 8 I.L.M. 679 (1969).

lations Canada can impose on French fishing vessels. When, subsequently, the Tribunal adopts a narrow and rigid interpretation of article 6, it confines Canadian regulatory authority only to those subject-matters within that restrictive interpretation. The Tribunal declared it had "no doubt" that in its "natural and ordinary sense," judging from municipal laws of the parties and others and from international agreements elsewhere, the phrase in article 6 "fishing regulations" means "legislative or regulatory prescriptions contained in the various systems of internal law, which fix the conditions to which all fish-catching activities are subject and are generally designed to maintain order on fishing grounds as well as to protect and preserve resources."<sup>64</sup>

Since the Tribunal does not actually discuss its analysis, it is impossible to know how it was conceived or conducted. However, the Tribunal's route to its conclusion rests primarily on its assumptions about the nature of fishing regulations and on a purported examination of municipal laws. Those assumptions are unwarranted, and the examination of municipal law seems incomplete and extremely narrowly formulated. It does not support the conclusion.

It is important to note that fishery regulations in state practice are concerned with considerably more than protecting a resource, as this Tribunal appeared to believe. Under general principles of international law, coastal state fishery jurisdiction is commonly exercised to achieve social, political, and economic aims that concern all governments. This includes, *inter alia*, employment, incomes, food supplies, environmental quality, and relations between residents.<sup>65</sup> Nations seek to secure these goals through regulations applying to all activities involved in or related to the exploitation of fish including fishery research, searching for fish, habitat protection, exploratory fishing (determining whether there are commercial quantities available), the numerous elements of the actual harvest (such as types of gear, how the gear must be stowed, how and where it may be deployed, what species can be taken, directly and incidentally, where, when, in what size and quantity), and how the catch can be processed, transhipped, transported, landed, discarded, or otherwise disposed of.<sup>66</sup> Accord-

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64. AWARD, *supra* note 12, para. 38.

65. For a review and discussion of common objectives of fishery management see generally, Report of the ACMRR Working Party, *supra* note 26; Anderson, A Comparison of Limited Entry Fishery Management Schemes, Appendix 1; FAO FISH. REP. No. 289, Supp. 3, *supra* note 29, includes discussions of management measures and objectives in Canada, USA, Japan, Malaysia, New Zealand, Australia, EEC, Cuba, Israel, and Chile. Troadec, *supra* note 6, at 3-21. In the United States, allocation decisions under federal law are determined in part by concern for the welfare of land-based processors, as in other nations. FEDERAL FISHERIES MANAGEMENT — A GUIDEBOOK TO THE MAGNUSON FISHERIES CONSERVATION AND MANAGEMENT ACT, 32-33 (Jacobson, Conner & Tozer, eds. 1985).

66. For a comprehensive summary of coastal state requirements for foreign fish-

ingly, if "fishery regulations" in article 6 means only the regulation of fish-catching, it is not because states in practice confine fishery regulations only to this phase of the fishery business. The restrictive scope of Canada's regulatory authority over fisheries is solely due to the Tribunal's conclusion on the source of authority, coupled with its restrictive interpretation of article 6. The Tribunal's concept of "fishery regulations" bears no resemblance to the real world, whether in France or in Canada or in general.

In light of the Tribunal's views on the source of coastal state authority in the context of a bilateral fishery agreement, it is important to refute the idea that any such agreement, referring without further elaboration to coastal state regulation, is necessarily referring only to harvesting and not to processing activities. The major ingredient in the Tribunal's reasoning is simple postulation, without discussion, that "fisheries regulations" means rules for fishing activities. Thus, arbitrarily and immediately, the Tribunal limits the range of regulation to only one phase of fisheries.<sup>67</sup> The Tribunal notes that these regulations later extended to different elements of the fishing activity, but this did not change what the Tribunal called the "common usage" of the term.<sup>68</sup> No evidence is cited for the "common usage"; it is simply assumed to fit the preconception of the majority. The Tribunal attaches no weight to the preambular statement that the Agreement concerns the relations of the parties in "fishery matters," a subject that might reasonably be considered to embrace activities beyond harvesting fish.

The Tribunal also invoked the authority of the International Court to justify use of domestic laws to interpret the Agreement. In seeking to define Canada's regulatory power found in article 6, the Tribunal professed that it must be guided by the content of the internal law of the parties and by municipal laws generally. Citing the ICJ judgment of Feb. 5, 1970 in the case concerning the Barcelona Traction, the Tribunal declared that to appreciate the sense of the phrase "fishing [sic] regulations"<sup>69</sup> the Tribunal must consider that "It is

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ing see Moore, *Coastal State Requirements for Foreign Fishing*, Appendix C, FAO LEGIS. STUDY No. 21 (Rev. 2 1985).

67. AWARD, *supra* note 12, para. 37.

68. *Id.*

69. Barcelona Traction, 1970 ICJ Rep. 37, para. 50. The Tribunal in several places in this discussion and elsewhere in the Award refers to "fishing regulations" when the actual term in article 6 is "fishery regulations." Perhaps this is an inadvertent change in terminology, but the reference to "fishing" appears more limited than "fishery." The latter can be regarded as embracing all activities involved in use of a resource, while the former might be considered to be specific to a particular phase of fishery, namely

to rules generally accepted by municipal legal systems . . . and not to the municipal law of a particular State' that reference must be made."<sup>70</sup> Without any actual reference to the parties' internal laws or to rules generally accepted by municipal legal systems, the Tribunal then concluded that "fishing [sic] regulations" referred only to regulation of fish harvesting and not to fish processing. Therefore these rules could not extend to the prohibition of filleting aboard French freezer trawlers.<sup>71</sup> The opinion does not indicate a reason for omitting direct citation or reference to the laws it regarded as significant for its interpretation. Omission of any discussion is doubly difficult to explain because elsewhere in the Tribunal's opinion concerning its interpretation of the LOS Convention, the majority conceded that "a number of coastal states" had laws governing processing by foreign vessels within coastal state jurisdiction.<sup>72</sup> One can only speculate on the reasons for this discrepancy.

The Tribunal's failure to complete the legal analysis is a severe flaw and casts substantial doubt on the credibility of the majority opinion and on its conclusions. Having insisted on the relevance of municipal laws to assist its interpretative task, one would expect that the Tribunal would have cited and discussed their significance. The Tribunal omitted them entirely. Canada's Counter-Memorial called attention to relevant municipal laws of the two parties.<sup>73</sup> Why those were not mentioned in the opinion is inexplicable.

In addition to the laws cited by Canada, *including French laws on processing*, even a modest search would have discovered that the European Economic Community (EEC), which makes fishery laws for France, in 1984 adopted conservation measures for foreign fishing off the coast of French Guyana. Those measures require that licensed vessels from two states, while fishing for snapper, must land fifty percent of their catches in French Guyana. The vessels must land seventy-five percent if the number of licenses is larger.<sup>74</sup> What this latter regulation signifies is that the EEC — which is the relevant

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harvesting.

70. AWARD, *supra* note 15, para. 38.

71. *Id.* at para. 39.

72. *Id.* at para. 53.

73. Counter Memorial of Canada, April 22, 1986, at 40-43.

74. Moore, *supra* note 66, at 169. The 1984 regulation was replaced by Council Regulation (EEC) No. 4040/86, 22 December 1986, OJ No. 6 376/101, which continues to require landings by foreign vessels fishing off French Guiana. Article 7 of the new regulation deserves special notice. In contrast to the Tribunal's majority view that coastal state authority to regulate fishing is limited to harvesting and biological considerations, Article 7 requires a foreign applicant for a license for fishing shrimp within the 200 mile fishing zone of French Guiana to enter into contracts with Guianan processors that are "consistent . . . with the objectives for the development of the Guiana economy. . . ." It can hardly be doubted that EEC authority over fisheries, exercised here expressly for economic purposes, does not exceed the sovereign rights of Canada over fisheries subject to its exclusive jurisdiction. *Id.* at para. 30.

municipal law besides that of Canada and France in this case — claims that its authority to regulate fisheries in waters subject to its jurisdiction specifically includes the authority to go beyond regulating fish-catching. In the case of French Guyana, it comprehends regulation of processing by requiring the landing of catches taken pursuant to licenses it grants. If the Tribunal had actually looked to the laws of the parties before it and given them the consideration its own view required, it could not plausibly have come to the conclusion that the “natural and ordinary meaning” of the critical phrase refers only to fish catching. At the very least, in view of Canada’s provision of information on the question of municipal law, the Tribunal needed to explain why these laws were not persuasive; instead, they are ignored.

The Tribunal’s conclusion about the “ordinary and natural” meaning is even more implausible in light of applying its own injunction to look at rules generally accepted by municipal legal systems. If the Tribunal had made a genuine effort in this direction, it would have discovered that not only the members of the EEC but also numerous states in Asia and Africa regulate processing activities by provisions that may require foreign fishing vessels to land all or a part of their catch.<sup>75</sup>

The majority’s view of the “natural and ordinary sense” of “fishery regulations” is further contradicted by its own recognition that article 62(4)(h) of the LOS Convention permits coastal state regulation of processing.<sup>76</sup> Nonetheless, in determining the scope of “fishery regulations,” the Tribunal attached no weight to the treaty provision for coastal states to regulate processing activities in the EEZ. Indeed, the Tribunal does not even allude to article 62 in discussing its interpretation of the term, although it does make the later reference mentioned above.<sup>77</sup>

It appears obvious that the majority of the Tribunal failed to ap-

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75. See the compilation of coastal state requirements in Moore, *supra* note 66. A brief search of the literature disclosed at least 31 coastal states with these provisions in their national laws, not counting the EEC members. Whether 41 or 51 states indicates “general acceptance” may be arguable. In this specific instance it is relevant that not all states are likely to be served by regulations about landings by foreigners fishing in the local EEZ. Accordingly, to find over 40 nations with such legislation or regulation, without searching intensively, is to record a common practice, sufficient at least to indicate that the term “fishery regulation” cannot justifiably be given a narrow meaning on the ground that it is the “natural and ordinary” sense of the term.

76. Art. 62(4)(h), LOS Convention, *supra* note 1. AWARD, *supra* note 12, para. 53.

77. AWARD, *supra* note 12, para. 53.

ply the law *they* identified as a determinative factor in interpretation of the 1972 Agreement. This performance does nothing to promote confidence in the process of international adjudication. Subsequent decision-makers will be misled if they conclude, on reading this opinion, that municipal legal systems seldom regulate processing activities by foreign vessels within their jurisdiction or that the term "fishery regulation" must be interpreted narrowly to refer only to the harvesting phase of fishing.

One question that deserves attention is whether it makes any difference that the Agreement in question was concluded in 1972, while the decision about its interpretation is made in 1986, after consequential changes in the law of the sea which substantially augmented coastal state authority over fish in a greatly enlarged area of national jurisdiction. This does not seem to have bothered the Tribunal's majority since the point is not mentioned and nothing in the opinion suggests a view that Canada's regulatory competence (as opposed to specific regulations) differs today from what it was in 1972. The majority's position is that, even now, Canada's "fishery regulations" refer only to fish-catching. The majority acknowledges that the 1972 Agreement itself anticipated promulgation of new regulations, but argued that none of the subsequent practice changed the meaning of the original phrase.

In any event the point requires reiteration that Canada's authority over foreign fishing does not derive from a bilateral agreement, or any agreement, with France or any other state or collection of states. The only real question is whether Canada agreed in 1972 to limit its regulatory authority as it may evolve over a subsequent period.

The Tribunal also seems to have acquired its limited notion of fisheries regulation from a mistaken perception that the LOS Convention embodies that same concept. Additionally, the Tribunal asserts that previous fisheries agreements were uniformly concerned only with protecting resources from overexploitation, although since the late 1950's this perception has been repeatedly dismissed as misdirected.<sup>78</sup> In fact the LOS Convention reflects the modern attitude that management of fisheries goes well beyond simply protecting a

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78. *Id.* at para. 49. In particular, Hiroshi Kasahara examines this misconception in his 1971 paper, *International Fishery Disputes*, in *World Fisheries Policy* 17 (B.J. Rothschild, ed. 1972). His conclusion is noteworthy: "The few examples mentioned above illustrate two things: international disputes over the fishery matters have a rather long history; and, contrary to the widely accepted notion that most of the past fishery agreements have dealt only with the question of conservation, some of the early agreements quite squarely faced problems of a political or economical nature. Conservation has indeed been a basic theme for most of the international fishery agreements concluded in recent years. But other features, such as the allocation of resources or catch, or the special rights of coastal states, have also been just as important in most cases, whether or not they are explicitly written in the provisions of the conventions concerned." *Id.* at 17.

resource. Since its misconception of the 1982 Convention may have affected the Tribunal's judgment, an examination of that treaty is essential to show what it actually provides, as opposed to what this Tribunal says of it.

### *The 1982 Convention on the Law of the Sea*

As mentioned above, disputants are inclined to invoke the 1982 LOS Convention to support their views of disputed jurisdictional matters.<sup>79</sup> Both Canada and France did so in this case.<sup>80</sup> The Tribunal responded by devoting several paragraphs to discussion of various provisions of the LOS Convention. Although in the end the Tribunal's specific views of the LOS Convention are not dispositive of the issues and otherwise have little precedential value,<sup>81</sup> some of its interpretations may incorrectly influence a subsequent proceeding by supporting a restrictive concept of fishery conservation.

After referring to the requirement that it rule "in accordance with international law," the Tribunal observes that the LOS Conference and state practice during and since "have crystallized a new international rule that a coastal state has sovereign rights in its exclusive economic zone in order to explore and exploit, preserve and manage natural resources."<sup>82</sup> The Tribunal found that both parties recognize this new rule.<sup>83</sup>

Noting that France has an economic zone and that Canada created fishing zones in 1971 and enlarged them in 1977, the Tribunal "believes that it may legitimately consider that between the Parties"

79. See *supra* notes 9-11 and accompanying text.

80. AWARD, *supra* note 12, para. 49.

81. The Tribunal held that the 1982 treaty does not displace the 1972 Agreement, but even this is a doubtful conclusion. Award, paragraph 51 first cites article 311 of the LOS Convention and then declares: "The Tribunal notes that although the Convention has been signed by Canada and France it has not yet come into force. It would therefore not be possible to invoke its provisions, notably those detailing the coastal State's regulatory powers, unless it was clear that these reflected generally accepted rules, and only in so far as they did in fact express customary rules applicable between the Parties to the proceedings." AWARD, *supra* note 12, para. 51.

The doubt arises from the majority's admission that the treaty provisions could have been invoked when it was "clear that these reflected generally accepted rules" and "express customary rules applicable between the Parties." Article 62(4)(h) concerning landings of catch by foreign vessels fishing in the EEZ probably now deserves to be considered as "generally accepted" (see Summary *supra* note 66). Both Canada and France, and the EEC for France, have laws regulating landings (in effect, processing), hence it could be argued strongly that these states accept such coastal authority as part of customary law.

82. AWARD, *supra* note 12, para. 50.

83. *Id.* at para. 49.



these concepts "are considered equivalent with respect to the rights exercised therein by a coastal State over the living resources of the sea."<sup>84</sup> However, the Tribunal also noted that it only needed to take into account those rules that were relevant and applicable to relations between the parties, meaning those not inconsistent with the 1972 Agreement.<sup>85</sup> The Tribunal ultimately and specifically held that provisions of the LOS Convention are inconsistent with the 1972 Agreement and that the latter prevails!

The majority's treatment of the Convention is noteworthy for its determined effort to interpret provisions on coastal authority over fisheries as narrowly as possible. This approach is consistent with the majority's attitude toward interpretation of the 1972 Agreement. The primary aim appears to be to seek support for the view that the Convention does not authorize the coastal state to regulate processing in the EEZ. However, at times the goal appears as an effort simply to minimize coastal control over foreign fishing. In the end the majority recognizes that the LOS Convention does support regulation of processing in the EEZ. However, the majority maintains that this is inapplicable in face of the 1972 Agreement (as the Tribunal restrictively interprets it).<sup>86</sup>

A number of questionable observations are advanced that merit notice and discussion. In response to a Canadian argument on the significance of article 56 of the LOS Convention regarding processing in its EEZ, the Tribunal declared that the coastal state's sovereign rights for management are always coupled with conservation. Therefore, it does not appear that this power "has any other purpose than conservation of resources."<sup>87</sup> Under this interpretation, conservation is regarded as dealing only with protection against overexploitation and not with protection of habitat, allocation of catches, or promotion of the welfare of those engaged in fishing. In other words, while the coastal state has management authority, that authority can only be exercised for "conservation," and not for other management purposes regarding exploitation of fish.

The Tribunal's characterization of the LOS Convention on this matter has wider implications than the single issue before it concerning regulation of processing. If the LOS Convention were as described, it would severely limit coastal state fishery management as a means of achieving a variety of significant national social, economic and political objectives.

The Tribunal does not explain how it reached its conclusion on the limited nature of management under the LOS treaty, other than not-

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84. *Id.*

85. *Id.* at para. 51.

86. *Id.* at para. 53.

87. *Id.* at para. 50.

ing the conjunction of the terms "management" and "conservation."<sup>88</sup> There is certainly no *a priori* reason to consider the functions of management to be limited to conservation defined as protection of a biological condition. The 1982 Convention is replete with provisions for coastal state management decisions, in the form of fishery regulations, that deal with fishery matters broadly.

The most important indication of the breadth of coastal state authority is in designation of the conservation and management measures that a state is authorized to take and the factors it can take into account in deciding upon the measures. The most significant characteristic of this designation is that coastal state conservation and management measures are *not limited to concern for the biological condition* of the living resources. Indeed this broader concept of management rights and responsibilities is the most important single achievement of the Convention in establishing and clarifying coastal state fish management authority. Article 61(3) declares that conservation and management

measures shall also be designed to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield, *as qualified by relevant environment and economic factors*, including the economic needs of coastal fishing communities and the special requirements of developing States, and taking into account fishing patterns, the interdependence of stocks and any generally recommended international minimum standards, whether subregional, regional or global.<sup>89</sup>

Considering the critical nature of this provision, it is hardly insignificant that the Tribunal offers a distorted and seriously misleading version of it by omitting the crucial qualifying phrase occurring immediately after "maximum sustainable yield."<sup>90</sup> The omitted phrase introduces an entirely different management concept for the outmoded notion of maximum sustainable yield (MSY) by adding economic, social, and other factors to the usual biological considerations. Significantly, the latter must be qualified by the former.<sup>91</sup> The Tribunal's legerdemain makes it appear that the Convention simply continues the traditional concept of management, when the main purpose of the provision was to place management in the service of broader social and economic goals.

The meaning of article 61(3) of the Convention is that the level of

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88. *Id.*

89. LOS Convention, *supra* note 1, art. 61(3).

90. Compare AWARD, *supra* note 12, para. 52 and LOS Convention, *supra* note 1, art. 61(3).

91. See *infra* notes 96-100, and accompanying text.

fish populations can be managed to meet both environmental and economic concerns. It need not be limited only to a restrictive notion of the biological abundance and status of the stocks. This expansion in management authority was designed to address the major weakness of traditional fishery management schemes that had been identified by practitioners — that successful fish management must take account of the effort expended in a fishery as well as the numbers of fish in order that fish harvesting can more nearly produce maximum net benefit.<sup>92</sup> Unless the coastal state is authorized to undertake such management, the continuation of foreign fishing as well as national fishing would considerably damage the resource and reduce the benefits to the coastal state and all fishing interests.

The Tribunal sought a further limit on the meaning of article 61 by narrowly interpreting its language regarding “economic needs of coastal fishing communities.” According to the Tribunal, that phrase “means the resource needs of such communities and not the whole of the other economic needs and interests.”<sup>93</sup> The Tribunal offered no reason for this conclusion. In fact a correct interpretation reveals that this reference to the economic needs of coastal fishing communities in article 61(3) is only the first of several factors in a non-exhaustive list of “environmental and economic factors” relevant to the coastal state for fashioning management and conservation measures.<sup>94</sup> Accordingly even if the “economic needs” reference were narrowed to “resource needs” (as contrasted to employment needs or income needs having to do with price and quality of fish) — for which the Tribunal offers no justification — it does not follow that these are the only “economic needs” that can lawfully be taken into account in adopting measures. National and local needs of various kinds relating to income and employment are obviously contemplated by the broader reference to relevant economic factors. Finally, employment in fishery-related activity, such as processing, is a legitimate coastal state economic need.

The drafters of articles 61 and 62 certainly never intended “resource needs,” in the sense of biological status (abundance) of a resource, to exhaust a coastal state’s legitimate economic concerns in managing a resource. The fisheries negotiators in the law of the sea sessions were well informed about the breadth of coastal fish management concerns. It is ironic that perhaps the clearest articulation of these considerations in the negotiations leading to the LOS Con-

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92. Crutchfield, *Economic and Political Objectives in Fishery Management*, WORLD FISHERIES POLICY, 74 (1972) summarizes these developments as of 1970. See generally, F. CHRISTY & A. SCOTT, *THE COMMON WEALTH IN OCEAN FISHERIES*, Chap. 12 (1965).

93. AWARD, *supra* note 12, at para. 52.

94. See *supra* note 90.

vention was in the Canadian working paper on fisheries submitted in 1972.<sup>95</sup> That working paper emphasizes the socio-economic factors, especially employment concerns, underlying the special interest of the coastal state in adjacent living resources and the basic principles for coastal state management.<sup>96</sup>

After completion of the first two LOS negotiating texts, one experienced and influential negotiator called attention to the new approach which accommodated social and economic needs and diminished the importance of the biological factor of maximum catch:

In the past, international fisheries conservation has sought to achieve the maximum sustainable biological yield from fisheries resources, although this goal was rarely achieved. Virtually for the first time, a more sophisticated (and more difficult to define and understand) concept is set as the goal of fishery conservation.

The new concept incorporated in the RSNT requires the adjustment of the conservation regulations, seeking the average maximum sustainable yield (MSY), so as to take into account environmental and economic factors as well as special requirements of developing countries (social considerations). In a practical sense, this results in reducing total fishing effort on a particular stock of fish and maintaining, on the average, a higher level of stock size with a reduced average annual yield from the fishery.<sup>97</sup>

It is difficult to put it more plainly. The coastal state measures authorized by this provision could be designed to encompass a good deal more than mere maximum biological catch that could be sustained over time. This observation also makes clear that these social goals are achieved in part by maintaining population abundance at a higher level than is associated with traditional management goals. This in turn usually means rejection of applications to fish to the highest level considered safe and this will often translate into reduction of foreign fishing effort.

LOS negotiators who were diplomats but not fisheries specialists understood that these new concepts embodied change. Ambassador Galindo Pohl of El Salvador, chairman of the Second Committee during the critical 1975 Geneva session of the Conference, reflects this in an analysis of the EEZ fisheries provisions:

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95. Working Paper on Management of the Living Resources of the Sea, in Report of the Committee on Peaceful Uses of the Seabed and the Ocean Floor Beyond the Limits of National Jurisdiction, 27 U.N. GAOR Supp. No. 21, 164 U.N. DOC. A/8721 (1972).

96. *Id.*

97. McKernan, *Fisheries and the Law of the Sea*, 11 MARINE TECH. SOC. J. 20 (1977). From 1966 to his retirement in 1974, Donald L. McKernan was the Special Assistant to the U.S. Secretary of State for Fisheries and Wildlife with the rank of Ambassador. He was the principal fisheries negotiator for the United States during this period.

The maximum sustainable yield and optimum utilization of marine species have been described as opposing aims. Biggest is not always best. The Exclusive Economic Zone has to be managed in such a way that fish populations are maintained at or restored to levels that can achieve the maximum sustainable yield in keeping with relevant economic and environmental factors (Article 61, paragraph 3). In addition, coastal states must promote the optimum utilization of the zone's living resources (Article 62, paragraph 1).

While optimum utilization may coincide with the maximum sustainable yield, it may also mean a smaller yield. Indeed, the maximum yield in purely quantitative terms does not always lead to larger revenues or more jobs. Other factors have a bearing on utilization, such as sport and recreational fishing, tourism, marine parks, and the need to maintain breeding stocks of fish and other marine animal life. In striving for optimum utilization, the economics of fisheries must be considered within the economy as a whole, and particularly as regards the allocation of material and human resources to each productive activity. Convergence of the maximum food yield and the greatest economic utilization of resources must be achieved by means of complex mechanisms for administering the fishery, referred to in the text as the management of resources.

Thus the experts define optimum utilization as a deliberate mix of biological, economic, social, and political objectives intended to result in the greatest social benefit as a consequence of the development of fishing resources.<sup>98</sup>

It should be noted that the drafters of these fishery provisions included some of the most knowledgeable fish management people in the world. The terms were carefully chosen to allow coastal states to undertake management to satisfy the full range of needs attainable by the fishery in question. Ambassador Galindo Pohl's excellent analysis recognizes that the new management objectives were well understood by negotiators.

Article 61's terms for flexible and broad management are reinforced by the comprehensive scope of the regulatory power embraced in article 62. It is impossible to read the detailed regulatory measures in article 62 and conclude that management is restricted only to biological concerns of fish conservation or to "resource needs" in the limited sense implied by the Tribunal. Professor Pharand's dissenting opinion identifies specific measures from article 62 that establish coastal state authority over processing in the EEZ:

In my opinion, the specific legal bases for regulating processing, including filleting, are found, either separately or in combination, in the following enumerated matters of Article 62: licensing of fishing vessels and equipment (subparagraph a); regulating the type of fishing vessels (sub-paragraph b); and, specifying the information required of fishing vessels (sub-paragraph c). In addition, the coastal State may rely on the "other terms and conditions" clause in the introductory part of paragraph 4 of that Article.<sup>99</sup>

The regulatory authority in article 62 is intentionally stated in broad terms to be consistent with the designation "sovereign right of

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98. Galindo Pohl, *The Exclusive Economic Zone in the Light of Negotiations at the Third United Nations Conference on the Law of the Sea*, in *THE EXCLUSIVE ECONOMIC ZONE* 31, 53 (Vicuna, ed. 1984).

99. AWARD, *supra* note 12, dissenting opinion, para. 17.

managing,” as expressed in article 56.<sup>100</sup> It is also consistent with the concept of sovereign rights that article 62 does not specifically enumerate all of the powers the coastal state may exercise through its laws and regulations and “other terms and conditions.” Foreign fishing states must comply with conservation measures “and with the other terms and conditions established in the laws and regulations of the coastal state.”<sup>101</sup> It is plain that the coastal state regulatory authority is restrained only to the extent that it must act consistently with the Convention. There are no subject-matter limitations that exclude such measures as regulation of processing, regulation of fishery research, powers to tax, or requirements relating to marketing, or requirements about the disposition of the catch. The coastal state is clearly not prohibited from regulating any phase of the fishing industry that occurs within its EEZ. If such regulation were impermissible, the coastal state would not have “sovereign rights for the purpose of exploring, exploiting, conserving and managing” as provided in article 56, nor the discretion to select applicable “terms and conditions.”

The sum of articles 56, 61, and 62 is that the coastal state determines the possibility of participation by a foreign entity in any phase of the fishing industry within the EEZ. If such participation is permitted, the coastal state decides the terms and conditions. Bilateral negotiations are the means for shaping the precise conditions of access if change is desirable and possible.

Under these specific categories of regulation, the coastal state may indirectly achieve important management goals related to specific national social and economic needs. Thus specific objectives in one dimension of a fishery can be achieved through regulations directed at another matter. For example, the objective of regulating who may fish may be easily accomplished via the power to establish and administer fee arrangements. If a coastal state bargains with distant water states, it can determine access to its surplus fish simply by accepting the highest payments offered, thus excluding all other bidders.<sup>102</sup> Establishing requirements for the area, duration and timing

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100. LOS Convention, *supra* note 1, art. 56.

101. *Id.* at art. 62(4).

102. It is this provision on fees that makes it economically feasible for a coastal state to allow foreign fishing on a “surplus.” Since the consequences of allowing the increased fishing effort represented by foreign fishing are very likely to reduce the net income available to local fishing by increasing their costs, foreign fishing on a “surplus” imposes a loss on those fishermen. Article 62(4)(a) allows the coastal state to charge fees at a level that will balance this additional cost, in addition to the other benefits it might

of permissible fishing may also affect who is allowed to fish, if at all, what they may catch and what may be earned. Thus, setting of times for fishing may preclude some participants from fishing at all and, by the same token, may determine the size and quality of the harvest, thus affecting prices.

Similarly, through its capacity to regulate the "types, sizes and numbers of fishing vessels that may be used," the coastal state may determine what range of activities may be pursued by foreign fishermen. Establishing the permissible size of vessel may exclude any or some foreign harvesting or, while allowing harvesting, may exclude processing. Control over numbers of vessels determines the level of income for participants from the given level of abundance and total catch. In addition, the authority to determine what species may be caught, and to fix quotas of catch by stock or by vessel, is the authority to determine when fishing is permissible and whether it may include processing. One of the outcomes of this case may be that by control over quotas, which the Tribunal considers within the independent authority of Canada, there can be no effective use of factory trawlers in the Gulf of St. Lawrence.<sup>103</sup>

The majority opinion had difficulty with the provision on laws and regulations in the LOS Convention. It is not an easy task to squeeze this broad terminology into the narrow scope of the Tribunal's concept of coastal authority. The majority's concern was whether the sovereign rights to manage the fishery included regulation of processing, specifically of filleting aboard the fishing vessel. In a textbook example of how not to interpret a treaty, the majority primarily focussed on but one subparagraph of the treaty before concluding that "[i]n the Tribunal's view, the regulation of filleting at sea cannot *a priori* be justified by coastal State powers under the new law of the sea rules."<sup>104</sup>

In reaching this conclusion the majority acknowledged that the list of fields of regulation was not exhaustive, but stated that "it does not appear that the regulatory authority of the coastal state normally

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derive by allowing foreign access. LOS Convention, *supra* note 1, art. 62(4)(a).

103. But this result does not necessarily follow. In actions subsequent to the Award, Canada unilaterally established fishing quotas for French vessels fishing in Canadian waters. France protested both the unilateral character of the decision and the size of the quota. In negotiations from Oct. 1986 to January 1987, the two parties agreed to further negotiations which would *inter alia* establish annual fishing quotas for French vessels in Canadian waters for the period 1988-91 inclusive. This was to be agreed by September 1987 but its effectiveness depended on another agreement to resolve other maritime claims off the coasts of Saint-Pierre, Miquelon and Canada. Unofficial English translation of Agreed Record of Canada-France Negotiations from October 1986 to January 1987. If disagreements about the authority to set quotas and their size are not resolved by the Parties, France can refer them to the dispute settlement procedures of the 1972 Agreement. In the end, therefore, Canada does not have the final say about quotas.

104. AWARD, *supra* note 12, at para. 52.

includes the authority to regulate subjects of a different nature than those described."<sup>105</sup> Not finding any specific reference to "processing" the majority found that the references to "gear" in article 62(4)(c) were only to fishing equipment in article 4(a) of the agreement.<sup>106</sup> The reference in article 4(a) of the Agreement could not include filleting equipment since this was processing equipment which "cannot be assimilated to fishing equipment in the ordinary meaning of terms."<sup>107</sup>

The problem with this approach is that it does not seek to take into account the whole of the provision being interpreted *before* stating a conclusion about the meaning of a part thereof. When the majority was forced to consider the whole of article 62(4) it had to conclude that indeed the coastal state did have authority to prohibit processing because subparagraph 4(h) specifically refers to "the landing of all or any part of the catch by such vessels in the ports of the coastal State,"<sup>108</sup> a regulation whose purpose often naturally precludes processing on board the fishing vessel. The majority noted that a number of states do require landings in order to encourage local processing or to protect jobs on land.<sup>109</sup> Despite the clarity of the provision, the majority nonetheless concluded that this provision could be made "applicable to foreign vessels only if the coastal State, acting within its sovereign rights, is not bound by any treaty or if a provision to this effect is included in a specific treaty concluded by the coastal State."<sup>110</sup> As discussed, this statement is without justification if it means that in a bilateral agreement dealing with fisheries the coastal state must expressly reserve all of its authority over fishing activities or be limited only to that authority mentioned in the bilateral agreement. No legal basis for this view is cited and so far as known, none exists.<sup>111</sup>

Despite the finding that a part of article 62(4) definitely contemplated the exercise of coastal regulatory power over processing, and authorized the coastal state to prohibit any processing, the majority

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105. *Id.*

106. *Id.*

107. *Id.*

108. LOS Convention, *supra* note 1, art. 62(4)(h).

109. AWARD, *supra* note 12, para. 53.

110. *Id.* at para 53.

111. In any event, a bilateral agreement on fisheries matters which refers to "fishery regulations" without qualification does not by use of such a term exclude requirements concerning landing or processing. Such a phrase is broad enough under normal circumstances to meet a supposed requirement for a treaty provision on the matter. Of course this Tribunal decided otherwise.



of the Tribunal still interpreted other parts of the article narrowly to exclude reference to processing equipment. No explanation for this is given except for a reference to the "ordinary meaning of terms."<sup>112</sup> As noted, the effect is to confer on France the right to use a type of vessel that, through other regulations (quotas), Canada has the right to render useless.<sup>113</sup> It is interesting to note that subsequent to this Award, France is claiming that Canada does not have independent authority to fix quotas.<sup>114</sup> If this view is upheld in arbitration, Canada may lose virtually all meaningful control over this French fishery.

Whatever the Tribunal's views on the application of the LOS Convention in the context of this specific dispute, it is clear that this extremely limited concept of coastal authority for fishery management departs from the reality of international practice and is without legal substance.

### *Full Sovereignty and Functional Sovereignty*

The majority opinion devotes a few sentences to a supposed distinction between "full sovereignty" and "functional jurisdiction."<sup>115</sup> This distinction, though difficult to interpret, could have disturbing implications in general application. The remarks on this point arose out of the parties' disagreement about the interpretation of the reference to "equal footing" in article 4 and "without discrimination" in article 6. France contended that the provision that French trawlers may continue to fish on an equal footing with Canadian trawlers meant that French trawlers have a right of access in common with Canadian vessels.<sup>116</sup> Canada contended that "equal footing" and "without discrimination" meant the same thing, namely that French

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112. Apparently the meaning of terms in the actual context of their use, as shown by other parts of the same paragraph, is not sufficient to alter their "ordinary meaning" which the Tribunal selected without regard to context.

113. AWARD, *supra* note 12, para. 63.

114. The only specific reference to quotas in the 1972 Agreement is in article 2 which reads:

In return, the Canadian Government undertakes in the event of a modification to the juridical regime relating to the waters situated beyond the present limits of the territorial sea and fishing zones of Canada on the Atlantic coast, to recognize the right of French nationals to fish in these waters subject to possible measures for the conservation of resources, including the establishment of quotas. The French Government undertakes for its part to grant reciprocity to Canadian nations off the coast of Saint-Pierre and Miquelon.

It seems unlikely that article 6 should be interpreted to exclude Canada's exclusive right to establish quotas within the Gulf of St. Lawrence, when the Agreement clearly envisions a right for areas outside this fishing zone. Subsequent practice is alleged by the French to indicate the right is not exclusive, but consultation with the French prior to establishing the quota does not suffice to deprive Canada of the right the parties intended in the Agreement. The records of the negotiations are very clear on this intention.

115. AWARD, *supra* note 12, para. 48.

116. *Id.* at para. 32.

trawlers were entitled to national treatment, i.e., they were subject to the same regulatory regime as Canadian vessels.<sup>117</sup> The Tribunal said that in practice, French vessels were not given national treatment and that they were subject to different laws, regulations, and particularly to different quotas than those applicable to Canadian vessels.<sup>118</sup> The Tribunal decided that "equal footing" meant a right of access to exploit the resource on the same basis as the Canadian vessels.<sup>119</sup>

Strangely, the Tribunal did not devote similar discussion to the principle of nondiscrimination in article 6 other than repeat what it had said in relation to "equal footing."<sup>120</sup> The Tribunal declared that this principle is limited in scope because in the past different regulations have been applied to French vessels than to French fishing boats. The Tribunal then offered a troubling comment:

Obviously, when in the exercise of the full sovereignty to which it is entitled over its own nationals Canada forbids them to engage in any given activity this does not entitle it to apply a similar prohibition in its fishing zone to French nationals enjoying fishing rights there that are recognized by treaty, for it cannot invoke its full sovereignty in a zone where the jurisdiction it exercises is only functional. Furthermore, as regards the scope of this principle, the Tribunal is of the opinion that the principle of non-discrimination relates only to the application of fishing regulations (these as previously defined) and that therefore it could not apply to processing catches at sea.<sup>121</sup>

The references to "sovereignty" here are not clear since if the last sentence means that Canada has no authority to regulate processing, then the principle of non-discrimination is irrelevant. On the other hand, the gratuitous nature of the statement calls for some comment if it is intended to have significance for the immediate problem. The 1972 Agreement certainly authorized Canada to regulate French trawlers and would appear to authorize no different treatment than accorded Canadian vessels if the principle of nondiscrimination means anything. The Tribunal appears to imply that in an exclusive fishing zone, where sovereignty is "functional," the coastal state cannot impose prohibitions decreed for its nationals upon foreigners because its limited jurisdiction in the latter instance is insufficient. The specific statement of the Tribunal refers not to foreigners generally but to "French nationals enjoying fishing rights there that are recog-

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117. *Id.*

118. *Id.* at para. 34.

119. *Id.*

120. *Id.* at para 48.

121. *Id.*

nized by treaty.”<sup>122</sup> However, this is not relevant where the question is what those rights are in relation to Canada’s authority to impose nondiscriminatory regulations. In other words, this reference begs the question and has nothing to do with the degree of Canadian “sovereignty” in the fishing zone. In any case this reference to fishing pursuant to a treaty is not offered as the reason for the difference in treatment. The difference is between “full” and “functional” sovereignty, a difference which does not arise from the bilateral agreement.

The Tribunal’s statement cannot be taken to mean that foreigners fishing in the exclusive economic zone pursuant to the LOS Convention escape the same or different regulations from those imposed on the coastal state’s nationals. The EEZ under the LOS Convention establishes functional sovereignty. This hardly insulates the foreigner from coastal fishing regulation prohibiting a particular activity to all those fishing there, national or foreign. Furthermore, the LOS Convention does not provide that foreign fishing must be treated exactly as domestic. Indeed the Convention does not hold out assurance that foreign fishing will be permitted at all except under conditions unilaterally determined by the coastal state. When foreign fishing is allowed, it must comply with coastal regulation subject only to the requirement of reasonableness, i.e., that the regulation be rationally related to a permissible objective.<sup>123</sup> It is not unreasonable to prohibit foreigners from undertaking activities also forbidden to nationals. Nor is it necessarily unreasonable to exclude foreigners from activities permitted to nationals. The Tribunal’s conception of this standard also merits comment.

### *The Standard of Reasonableness*

According to article 2 of the Arbitration Agreement of 1985, the Tribunal was to rule in accordance with international law.<sup>124</sup> Pursuant to that injunction, the Tribunal invokes passages from prior international decisions and seeks to use them for guidance in its consideration of issues. Unfortunately, recourse to previous opinions in cases not on point for more or less abstract propositions of law does not lead to, or create, sound application to immediate circumstances. Earlier comment noted the misapplication of the interpretive approach the Tribunal extracted from the Barcelona Traction case.<sup>125</sup> Strangely enough, another instance arises from that same case. After

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122. *Id.*

123. The Tribunal invoked the rule of reason in the form that “requires state behavior to be proportional to the aim legally pursued, with due regard to the rights and freedoms granted to another state.” AWARD, *supra* note 12, para. 54.

124. *Id.*, p. 2.

125. *See supra* note 69 and accompanying text.

conceding that under the LOS Convention the coastal state can regulate processing were it not for another agreement such as the 1972 Agreement, the majority again invoked the Barcelona case:

The Tribunal finally points out that, like the exercise of any authority, the exercise of a regulatory authority is always subject to the rule of reasonableness invoked by the International Court of Justice in the Barcelona Traction case, as follows: "The Court considers that, in the field of diplomatic protection as in all other fields of international law, it is necessary that the law be applied reasonably . . ." That rule requires State behavior to be proportional to the aim legally pursued, with due regard to the rights and freedoms granted to another State.<sup>126</sup>

This quotation is immediately followed by another from the North Atlantic Coast Fisheries Case in 1910. This latter quotation, however, differs because it refers directly to a requirement of reasonableness in regulating fisheries: "The Award considered that the only regulations to appear reasonable were those which were 'appropriate or necessary for the protection and preservation of such fisheries, or desirable or necessary on grounds of public order and morals without unnecessarily interfering with the fishery itself.' . . ."<sup>127</sup>

As if these quotations from other cases involving other circumstances were sufficient to make the conclusion self-evident, the Tribunal then declares:

In the present case, the Tribunal therefore holds that Canada can only use its regulatory authority concerning the French trawlers referred to in Article 4(b) of the 1972 Agreement in a reasonable manner, i.e., without subjecting the exercise of the right to fish enjoyed by such trawlers under the Agreement to requirements which in effect make that exercise impossible.<sup>128</sup>

Two points about this conclusion of the Tribunal are central. First, the entire preceding analysis in the opinion was devoted to the argument that Canada had no right to regulate as it sought to do regarding *La Bretagne*. In fact, the Tribunal argued that Canada had never really adopted what the Tribunal considered "fishery regulations" within the meaning of the 1972 Agreement.<sup>129</sup> In light of these positions, it is curious that the standard of reasonableness was thought to have any relevance at all. To invoke the principle that a regulation must be reasonable presumes that the authority to regulate exists in the first place. Therefore this part of the opinion is irrelevant unless the discussion of reasonableness relates to future

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126. Award, *supra* note 12, para. 54.

127. *Id.*

128. *Id.*

129. *Id.* at para. 47.

relations of the Parties. The Tribunal repeatedly advises that its overriding concern is the future relations of the Parties. Therefore, this pronouncement, even if dictum, has portents for the future.

Secondly, assuming reasonableness is appropriately invoked, the application of the standard to the facts in the case seems extravagantly incorrect. It is difficult to discern, let alone understand, the reasoning underlying this application. The Tribunal simply presumes that a prohibition on filleting makes it impossible for France to exercise the right to fish. In light of the preceding 200 years of continuous French fishing in the area, little of it employing freezer trawlers (none of it from Saint-Pierre and Miquelon), the connection between the prohibition and the right to fish simply does not exist. It is not reasonable to assume that *future* fishing from Saint-Pierre and Miquelon would be impossible unless freezer trawlers are employed.

On the other hand, perhaps these propositions by the Tribunal had another significance. The Tribunal may be anticipating future difficulty from Canadian regulations affecting the use of foreign trawlers. If Canada subsequently exercises its right to regulate by independently imposing quotas for French freezer trawlers, it could be argued on the basis of this opinion that a particular quota is so low as to be unreasonable because its practical effect is to prohibit freezer trawlers. This is pure speculation. Nothing in the opinion directly suggests this possibility. Indeed some of the majority's views might be interpreted to suggest the opposite. Nonetheless, subsequent to this opinion, France has expressed its regret that the quotas established by Canada for 1987 are "so low." In addition, France declared that "they consider that such quotas will not permit French vessels to benefit effectively from the permanent fishing rights" of France under the 1972 Agreement.<sup>130</sup>

### *The Dispute Settlement Provision of the 1972 Agreement*

Article 10 of the 1972 Agreement establishes a compulsory dispute resolution procedure between the parties. Paragraph 3 provides "If, in connection with any dispute referred to the Commission by either of the contracting parties, the Commission has not within one month reached a decision acceptable to the contracting parties, reference shall be made to the third expert. The Commission shall then sit as an arbitral tribunal under the chairmanship of the third expert."<sup>131</sup> This procedure effectively binds each of the parties to proceed at the initiative of the other. In addition it precludes refusal or

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130. French protest note to Canada, January 1987, referring to the Canadian Embassy's Notes Verbales No. 353 of Dec. 30, 1986 and No. 026 of Jan. 27, 1987.

131. 1972 Agreement, AWARD, *supra* note 12, at 7.

failure to cooperate.<sup>132</sup>

This settlement procedure, especially in light of the majority's use of the reasonableness standard, may seriously compromise Canada's general fisheries management authority insofar as it might affect French vessels. It may also affect Canadian vessels if domestic interests now push for equal treatment. If, for example, Canadian fishery regulations such as specific quotas, may be so easily challenged as this provision suggests, both the finality and significance of management measures are called into serious question. It may be recalled in this connection that the possibility of undermining coastal state regulation was the primary factor for limiting application of compulsory dispute procedures to issues arising under the fisheries provisions under the LOS Convention. Article 297 of the Convention excepts from compulsory settlement procedures "any dispute relating to [the coastal state's] sovereign rights with respect to the living resources in the exclusive economic zone or their exercise. . . ."<sup>133</sup> This decision in this case substantiates the wisdom of that exclusion.

#### CONCLUSION

The majority opinion in the *La Bretagne* award leaves an enormous amount to be desired. The decision is inexplicable except as it reflects serious misunderstanding of international fisheries law and a general predisposition among some international lawyers to regard coastal state fishery management in areas of extended jurisdiction with suspicion and mistrust. As faulty as this opinion and its outcome are, its impact upon future Canadian fisheries management in the Gulf of St. Lawrence remains unclear.

Most of the uncertainty stems from what the Tribunal identified as certain "final considerations" which appear to make the use of freezer trawlers impractical. The Tribunal acknowledged that the additional fishing capacity of these trawlers might pose a threat to the fishery resources of the Gulf.<sup>134</sup> Noting that the parties had set a double limit on fishing effort from Saint-Pierre and Miquelon (ten trawlers of fifty meters each), the Tribunal said that it "does not rule out the possibility that, in so doing, they also contemplated giving these vessels a total fishing capacity comparable to that possessed by 10 wetfish trawlers of the same size."<sup>135</sup>

132. *Id.*

133. LOS Convention, *supra* note 1, art. 297.

134. AWARD, *supra* note 12, paras. 62-63.

135. *Id.* para. 63.

The Tribunal did not accept the fact that the use of freezer trawlers would necessarily lead to catches over and above those allocated to ten wetfish trawlers. Therefore, the prohibition on filleting was not warranted. Additional reasons for this conclusion were that (1) overfishing by French trawlers would be a breach of good faith, for which France would be liable; (2) during the proceedings, France made a commitment that the French vessels would not exceed their authorized quota; and (3) Canada supervises the actual fishing and can assure itself that no excessive catch is taken by freezer trawlers.<sup>136</sup>

These reassuring words indicate that though a freezer trawler cannot be prohibited from fishing, it cannot actually take fish in accordance with its enlarged fishing capacity. If this is the correct interpretation, one wonders why the Tribunal went through such contortions to reach its result. In the final analysis, it appears that Canada can determine the most significant outcome of fishing in the Gulf — how much fish can be taken by any one vessel or group of vessels — but cannot prohibit or regulate the type of vessel by which that catch can be taken. This conclusion is reached despite the admission that the type of vessel involved may have a harmful impact on a resource. The utility of this result is not self-evident from either party's perspective.

Another interpretation of these "considerations" is possible. The Tribunal does not directly address the question of who determines the quotas to be taken in the Gulf. The impression is that this is Canada's decision. If it is Canada's exclusive prerogative to fix the catch, there may be no problem. If, however, the determination of a quota must be reasonable in its impact on the fishing process, and on the right to fish, then the premise is established for an argument that if Canada sets the same quota for freezer trawlers as it did for wetfish trawlers, the effect is to prevent these vessels from exercising their right to fish. Furthermore, an argument might be made that Canada's quota is a means of discriminating against French vessels, which are the only freezer trawlers permitted in the Gulf. Under article 10 of the 1972 Agreement, it appears that France could force another arbitral decision on these issues.

What appear to be possibilities only in the terms of the Award may be much closer to realities in light of events subsequent to the Award. According to an unofficial English version of a protest note to Canada,

French authorities strongly protest the unilateral establishment by Canadian authorities of the fishing quotas allocated to France in Canadian waters in 1987. They consider such action to be contrary to both the letter and

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136. *Id.*

the spirit of the [1972] Treaty . . . and to the practice followed by the Parties in application of this Treaty: the fishing quotas allocated annually to France by Canadian authorities have, in fact, always been established by the two countries by agreement . . . .<sup>137</sup>

France also objected that the quotas were so low.<sup>138</sup>

The fate of these protests is not known at this writing nor is it known how Canadian-French fishing relations in general are progressing, except that there are continuing difficulties concerning French fishing off eastern Canada.

The major conclusion in assessing this Award and the majority opinion of the Tribunal is that the Award is not reliable authority for the process of treaty interpretation, the substantive positions it holds regarding the specific issues in dispute, or the general implications of the propositions offered in support of its conclusions. The opinion is flawed not only in its general approach to coastal state fishery management authority, but also as a dependable source of guidance for smooth fishery relations between Canada and France.

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137. Agreed Record, *supra* note 103. I am grateful to Dean Donald MacRae of the University of Ottawa for assistance in securing the Award and the Canadian memorials and to Prof. Ted McDorman of the Faculty of Law, University of Victoria, for sending me the Agreed Record, the French and Canadian notes, and other materials on this episode.

138. *Id.*



